Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

ARNIE GONZALEZ,
AND ALL OTHERS SIMILARLY SITUATED

Petitioners

v.

CITY OF DEERFIELD BEACH, FLORIDA

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an emergency medical technician or rescue supervisor who does not actually engage in any fire suppression activities can be said to have the "responsibility to engage in fire suppression" within the meaning of the Fair Labor Standards Act, 29 U.S.C. § 203(y)(1)—a question on which the courts of appeals are in active conflict.

PARTIES TO THE PROCEEDINGS

Named petitioner Arnie Gonzalez instituted this action pursuant to 29 U.S.C. § 216(b), which provides in part that an action to recover unpaid overtime compensation may be maintained "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated."

Subsection 216(b) also provides that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." The following individuals have filed consents in this case:

Keith C. Abbott
Lester A. Bauman
Walter Broadhead
Alessandro R. Cantalupo
William Conner
Len R. Elton
Joseph Langlois
Howard T. Noland
Randall D. Robertson
Michael B. Robinson
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PETITION FOR WRIT OF CERTIORARI

Arnie Gonzalez, and all others similarly situated, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-11a) is reported at 549 F.3d 1331. The opinion of the District Court for the Southern District of Florida (App. 12a-24a) is reported at 510 F. Supp. 2d 1037.

JURISDICTION

The judgment of the court of appeals was entered on November 24, 2008. *See* App. 1a. That court denied petitioners' timely petition for rehearing en banc on February 5, 2009. *See* App. 25a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 7 of the Fair Labor Standards Act ("FLSA") provides in pertinent part:

> (k) Employment by public agency engaged in fire protection or law enforcement activities. No public agency shall be deemed to have violated subsection (a) [regarding compensation for overtime] with respect to the employment of any *employee in fire protection activities* or any employee in law enforcement activities (including security personnel in correctional institutions) if . . . .

29 U.S.C. § 207(k) (emphasis added).

Section 3 of the FLSA provides in pertinent part:

> (y) "Employee in fire protection activities" means an employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker, who—
>
> (1) is trained in fire suppression, has the legal authority and *responsibility to engage in fire suppression*, and is employed by a fire department of a municipality, county, fire district, or State; and
>
> (2) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

29 U.S.C. § 203(y) (emphasis added).

STATEMENT OF THE CASE

1. As the court of appeals correctly observed, the "relevant facts are straightforward." App. 3a. Petitioners are twelve current and former employees of the City of Deerfield Beach, Florida ("City"), the sole respondent. Each petitioner works or worked for the City's Fire and Rescue Department either as a Firefighter/Emergency Medical Technician ("EMT") or as a Rescue Supervisor. *See id.* Regardless of their formal job titles, petitioners undoubtedly work on the "Rescue" side of that Department. As the court below described them, petitioners' duties "consist of providing emergency medical assistance"; specifically, petitioners "respond to car accidents, heart attacks, and other situations requiring medical care." *Id.* As a general rule, moreover, petitioners "do not respond to fire calls, and when they do, they tend to

the victims of the fire instead of fighting the fire itself." *Id.* Indeed, although petitioners "are assigned the protective 'turnout' gear worn by firefighters, they do not wear it when responding to fire calls"; to the contrary, they "wear the gear only when called to accident scenes involving a hazard of broken glass." *Id.*

Given these responsibilities, it is no surprise that although petitioners have "the training necessary to engage in fire suppression, they rarely, if ever, are called upon to do so. In fact, [Arnie] Gonzalez is the only class member *ever* to have engaged in fire suppression, and he has done so only on a handful of occasions." *Id.* (emphasis added). On the other hand, given their training and their positions in the Fire and Rescue Department's chain of command, petitioners "concede the 'theoretical possibility' that a commanding officer could direct them to engage in fire suppression." *Id.*

2. Petitioners filed this action against the City in the District Court for the Southern District of Florida in 1996. *See* App. 12a. In their single claim, petitioners alleged that the City failed to properly compensate them for overtime work; they sought to recover the unpaid compensation pursuant to the "collective action" provision of the FLSA, 29 U.S.C. § 216(b). *See* App. 2a & n.1; *supra* p. ii. The City moved for summary judgment, arguing that with respect to petitioners, the City is not subject to the FLSA's otherwise applicable overtime standard because petitioners "fall under an exemption in § 207(k) of the Act for individuals employed by a 'public agency engaged in fire protection . . . activities.'" App. 4a (quoting 29 U.S.C. § 207(k)). The district court granted the City's motion and entered a final judgment against petitioners. *See* App. 2a.

3. A three-judge panel of the Eleventh Circuit affirmed. The panel recognized that the "dispute in this case turns on whether [petitioners] can be considered employees 'engaged in fire protection activity' " within the meaning of § 207(k). App. 4a. And the answer to that question turns on the interpretation of § 203(y) of the Act, which provides that "Employee in fire protection activities" means an employee who, *inter alia*, "is trained in fire suppression, has the legal authority and *responsibility to engage in fire suppression*, and is employed by a fire department of a municipality, county, fire district, or State." 29 U.S.C. § 203(y)(1) (emphasis added), *reproduced at supra* p. 2. The panel rightly observed that the sole disputed aspect of this definition is the emphasized clause, in that petitioners "concede that they meet all of § 203(y)'s criteria except" the requirement that they "have the responsibility to engage in fire suppression." App. 5a.

As to that one disputed issue, the panel held that the issue was controlled—indeed, wholly resolved—by the Eleventh Circuit's recent decision in *Huff v. DeKalb County*, 516 F.3d 1273 (11th Cir. 2008). As described by the panel, the dispute in *Huff* (just like the dispute in the present case) "turned solely on whether the plaintiffs had the 'responsibility to engage in fire suppression' under § 203(y)." App. 5a. As further described by the panel, *Huff* "concluded that the plaintiffs were responsible, *regardless of whether they had ever actually engaged in fire suppression*." *Id.* (emphasis added). In particular, *Huff* "held that the ordinary meaning of the term 'responsibility' 'does not imply any actual engagement in fire suppression,' and that 'employees may have a "responsibility to engage in fire suppression" without ever actually engaging in fire suppression themselves.'" App. 6a (quoting *Huff*, 516 F.3d at 1281).

As elaborated below, the panel purported to distinguish decisions of two courts of appeals that sided with employees in similar circumstances, *Cleveland v. City of Los Angeles*, 420 F.3d 981 (9th Cir. 2005), *cert. denied*, 546 U.S. 1176 (2006) and *Lawrence v. City of Philadelphia*, 527 F.3d 299 (3d Cir.), *cert. denied*, 129 S. Ct. 763 (2008). *See* App. 8a-10a. But in the end, the panel did not rely on those purported distinctions: "In any event, "*Huff* controls here, and under *Huff*, [petitioners] have the 'responsibility to engage in fire suppression' for purposes of § 203(y). We therefore hold that [petitioners] fall within § 207(k)'s exemption from the FLSA's general overtime requirements." App. 10a. Accordingly, the panel affirmed the district court's granting of summary judgment to the City.[1]

5. Petitioners timely petitioned for rehearing en banc. Their petition argued principally that "[t]ogether with the [Eleventh Circuit's] decision earlier this year in *Huff v. DeKalb County*, the panel's decision here has precipitated a conflict between [the Eleventh Circuit] and two other Circuits on an important and recurring question of federal labor law. En banc consideration of that question is warranted to address the conflict." Petition for Rehearing En Banc at 5 (filed Dec. 12, 2008); *see also id.* at 10 (contending that this proceeding presents a question of exceptional importance because "it involves an issue on which the panel decision conflicts with the authoritative decisions of every other United

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[1] In so ruling, the panel rejected petitioners' arguments regarding the so-called "80/20 Rule" found in a Department of Labor regulation codified at 29 C.F.R. § 553.212(a), as well as petitioners' argument that the district court erroneously denied them leave to amend their complaint. *See* App. 10a-11a. Petitioners do not seek review as to those two issues.

States Court of Appeals that has addressed the issue" (quoting Fed. R. App. P. 35(b)(1)(B))).

The full Eleventh Circuit denied the rehearing petition without comment. *See* App. 25a-26a.

REASONS FOR GRANTING THE PETITION

Confirming and extending an earlier Eleventh Circuit decision, and rejecting petitioners' express request to resolve the conflict en banc, the court below entered a decision in conflict with the decisions of two United States courts of appeals on an important and recurring question of federal labor law. *See* Rule 10(a). Review is warranted to resolve that conflict.

I. Both the Decision Below and an Earlier Eleventh Circuit Ruling Conflict with the Decisions of the Ninth and Third Circuits.

As noted above, the panel purported to distinguish the Ninth Circuit's decision in *Cleveland v. City of Los Angeles* and the Third Circuit's decision in *Lawrence v. City of Philadelphia*. But the distinctions drawn by the panel are illusory, and there is accordingly a real split between the court below and those two Circuits.

A. Cleveland v. City of Los Angeles.

In *Cleveland*, the Ninth Circuit was called upon to "determine whether the fire protection exemption [set out in § 207(k) of the FLSA] should be applied to dual function paramedics, [i.e.,] individuals trained in both fire suppression and advanced life saving." 420 F.3d at 983. As here, *Cleveland* "turn[ed] on whether Plaintiffs have the *responsibility* to engage in fire prevention" as that term is used in § 203(y) of the FLSA. 420 F.3d at 989. As a matter of statutory construction, the Ninth Circuit held that the "ordinary, common meaning of the

word 'responsibility'" should control. *Id.* Applying this meaning, the court held that "for Plaintiffs to have the 'responsibility' to engage in fire suppression, they must have some real obligation or duty to do so. If a fire occurs, it must be their job to deal with it." *Id.* at 990.

Cleveland then laid out six items of evidence demonstrating that although the Los Angeles paramedics were "fully trained and certified in . . . fire suppression skills," *id.* at 983, the paramedics nonetheless did not, *in fact*, engage in any fire suppression. *See id.* at 990; *accord* App. 9a (recognizing that "the *Cleveland* plaintiffs had been fully trained in both firefighting and life support, but had never engaged in actual fire suppression"). On this evidentiary basis, the Ninth Circuit ruled that the Los Angeles paramedics lacked the requisite "responsibility" under the FLSA. *See* 420 F.3d at 990.

The Eleventh Circuit panel conceded that "there are many similarities between the *Cleveland* plaintiffs' jobs and the jobs of [petitioners] here." App. 9a. But the panel attempted to distinguish the two cases on the basis that "the most important factor present in *Huff*—and present here—was absent in *Cleveland*: there, unlike here, the plaintiffs could not be ordered to engage in fire suppression." *Id.* (citing *Cleveland*, 420 F.3d at 984; *Huff*, 516 F.3d at 1279-80). With all due respect, the panel misread *Cleveland* in this crucial regard.

The Ninth Circuit did not say in the passage cited by the panel that the Los Angeles paramedics "could not be" ordered to engage in fire suppression; instead, the Ninth Circuit said that there "is no evidence that any Plaintiff . . . *has ever been* ordered to perform fire suppression." 420 F.3d at 984 (emphasis added). The court repeated this phrasing in laying out the various reasons

why it was not the paramedics' job—not their "real" job anyway—to suppress fires: "there is no evidence that a dual function paramedic *has ever been* ordered to perform fire suppression." *Id.* at 990 (emphasis added).[2] Thus, it should be apparent that under *Cleveland*, the relevant question is not the theoretical one whether an employee *could* (or *could not*) be ordered to fight fires; rather, the relevant question in the Ninth Circuit is the empirical one whether the employee *actually has* fought fires.

Subsequent FLSA litigation in the Ninth Circuit confirms the foregoing interpretation. In *Weaver v. City & County of San Francisco*, 158 Fed. Appx. 921 (9th Cir. 2005), the court of appeals remanded the case for reconsideration in light of *Cleveland*. On remand, the district court found it to be "undisputed that an Incident Commander at the scene of a fire *can* and on occasion does order ambulance-assigned [firefighter/paramedics] to

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[2] The panel also read *Cleveland* to say that the plaintiffs in that litigation "could volunteer to assist firefighters at a fire scene, but they were not *required* to do so and were not subject to discipline for failing to do so." App. 9a (emphasis deleted and emphasis added). What *Cleveland* actually said was that "paramedics may volunteer to assist firefighters at a fire scene, but if they do not volunteer, they are not subject to discipline." 420 F.3d at 984. It is not clear from this passage precisely what paramedics were "required" to do if they were asked. Indeed, a district court in the Ninth Circuit concluded, based on its reading of the record in *Cleveland*, that the plaintiffs in that case in fact "*were* required to engage in fire suppression if requested to do so by their supervisors." *Weaver v. City & County of San Francisco*, No. C 03-1589 SI, 2006 U.S. Dist. LEXIS 62650, at *6 (N.D. Cal. Aug. 18, 2006) (emphasis added) (citing findings of fact in district court proceedings in *Cleveland*).

engage in fire suppression activities." *Weaver v. City & County of San Francisco*, No. C 03-1589 SI, 2006 U.S. Dist. LEXIS 62650, at *3 (N.D. Cal. Aug. 18, 2006) (emphasis added). But the undisputed fact that the public employees *could* be ordered to engage in fire suppression activities did not result in victory for the defendant municipality, as would have been the result under the decision of the panel below. To the contrary, following *Cleveland* and finding that the employees "perform fire suppression work only rarely, and when they do, their activities are only peripheral in nature," *id.* at *10, the district court in *Weaver* granted summary judgment to those employees. *See id.* at *16.

B. *Lawrence v. City of Philadelphia.*

In *Lawrence*, the Third Circuit considered "whether paramedics employed by the City of Philadelphia Fire Department have 'legal authority and responsibility' for fire suppression activities within the meaning of the Fair Labor Standards Act." 527 F.3d at 302. Decided shortly after *Huff*, *Lawrence* held that these paramedics "were not responsible for engaging in fire suppression, even though 'the incident commander theoretically has authority to tell [the paramedics] to do anything at the scene of a fire.'" App. 9a (quoting *Lawrence*, 527 F.3d at 318). For the Third Circuit, "[t]heoretical possibilities are not evidence." App. 10a (quoting same). What mattered to the Third Circuit were actualities: "There is no evidence that [Philadelphia paramedics] are ever dispatched to a fire scene for the purpose of fighting a fire," and "there is no evidence in the record to support the assertion that the [paramedics] are expected to engage in fire suppression as part of their job duties." 527 F.3d at 317.

Although the Eleventh Circuit panel asserted that *Lawrence* is "fundamentally different" from the present case, App. 10a, it should be apparent from the foregoing that any factual differences between the two cases are not truly fundamental. Thus, in *Lawrence*, there was no evidence that the paramedics were dispatched to fire scenes for the purpose of fighting fires; here, petitioners generally "do not respond to fire calls, and when they do, they tend to the victims of the fire instead of fighting the fire itself." App. 3a. In *Lawrence*, moreover, there was no evidence that the paramedics were expected to engage in fire suppression as a part of their job duties; here, petitioners "rarely, if ever, are called upon to" engage in fire suppression. *Id.*[3]

What *is* fundamentally different, however, are the interpretive approaches of the Third Circuit and of the Eleventh Circuit. As quoted above, *Lawrence* expressly eschewed the "theoretical possibilities" as to what an incident commander could direct a paramedic to do at a

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[3] The panel also suggested that *Lawrence* was distinguishable because the plaintiff-employees in that case might not have satisfied § 203(y)(1)'s requirement that the employee be "trained in fire suppression," such that the Third Circuit could have resolved the case without any necessity to construe the term *responsibility*: "If the plaintiffs in *Lawrence* lacked the proper training, that fact alone would place them outside § 203(y)'s ambit, regardless of whether they were deemed responsible for fire suppression." App. 10a. There is no question, however, that the Third Circuit did not actually decide the case in the manner conceived by the panel: The plaintiffs "were not responsible for fire protection activities as a matter of law," and therefore it "is not necessary t reach the question whether [they] were 'trained' in fire suppression." *Lawrence*, 527 F.3d at 319.

fire scene, but the panel below positively embraced the "'theoretical possibility' that a commanding officer could direct [petitioners] to engage in fire suppression." App. 3a. Indeed, that petitioners "can [i.e., theoretically] be required" to engage in fire suppression was essentially dispositive for the panel in light of *Huff*, because "the fact that [petitioners] never *actually* engage in fire suppression is simply irrelevant." App. 7a (emphasis added). Of course, this is precisely the approach advocated by the *dissent* in *Lawrence*: a court "must ask whether an [employee] has the 'responsibility' to engage in fire suppression and the answer to this question does not depend upon how much time [that employee] actually spends on such activities." 527 F.3d at 320 (Hardiman, J., dissenting).

In *Lawrence*, Circuit Judge Hardiman recognized "an emergent circuit split regarding the interpretation of the phrase 'responsibility to engage in fire suppression' as used in § 203(y) of the Fair Labor Standards Act." *Id.* The decision of the panel—followed by the en banc court's refusal to take up the issue—confirms that split and leaves the Eleventh Circuit in direct conflict with both the Ninth Circuit and the Third Circuit.

II. Review Is Warranted to Resolve the Conflict.

The above-described conflict is not just academic. Rather, the question presented here is a recurring one, and the panel's decision contradicts a long-standing and important principle of federal labor law.

First, the question is a recurring one. In addition to the present case and *Huff* only last year, the district courts in the Eleventh Circuit have often confronted the FLSA's exemption for "fire protection." *See, e.g., Diaz v. City of Plantation, Florida*, 524 F. Supp. 2d 1352, 1365

(S.D. Fla. 2006) ("the Court must also address whether Plaintiffs have the legal authority and responsibility to engage in fire suppression"); *Prickett v. DeKalb County*, 276 F. Supp. 2d 1265, 1267 (N.D. Ga. 2003) ("Plaintiffs alleged that the [§ 207(k)] exemption did not apply because their primary duty was not providing fire protection services, but rather emergency medical services."), *rev'd*, 349 F.3d 1294 (11th Cir. 2003), *cert. denied*, 542 U.S. 919 (2004). As illustrated by the *Weaver* case discussed above (*supra* pp. 8-9), the district courts in the Ninth Circuit have also addressed the issue in recent years. Finally, there is the ongoing *Lawrence* litigation in the Third Circuit, whose decision was the subject of an unsuccessful petition for certiorari earlier this Term (as No. 08-388).

Second, and more importantly, the Eleventh Circuit panel's interpretation of the FLSA contravenes the principle, long recognized and applied by this Court in disputes over that statute's wage-and-hour provisions, that "exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *see also, e.g., Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 296 (1985) (observing that the Court "has consistently construed the [FLSA] 'liberally to apply to the furthest reaches consistent with congressional direction'" (quoting *Mitchell v. Lublin, McGaughy & Associates*, 358 U.S. 207, 211 (1959))).

One searches the panel's opinion in vain for any acknowledgment of this principle. Likewise, although the Eleventh Circuit in *Huff* professed to be "guided by canons of statutory construction" when it determined the

meaning of § 203(y)(1), 516 F.3d at 1280, *Huff* certainly was not in fact guided by the above-quoted canon established by this Court. Consequently, although the panel was correct to base its interpretation of the exemption on the statutory "text," App. 6a, there are (as the Third Circuit correctly recognized) "additional considerations in an FLSA case because the FLSA must be construed liberally in favor of employees." *Lawrence*, 527 F.3d at 310. Those considerations were noticeably absent from the panel opinion and, before that, from *Huff*.

The proper interpretation of the statutory phrase "responsibility to engage in fire suppression," 29 U.S.C. § 203(y)(1), is an important and recurring question of federal law. Because the panel's interpretation of the FLSA pays no heed to the applicable canon of construction of that statute laid down by this Court, and because the panel's interpretation confirms a conflict between the Eleventh Circuit and the Ninth and Third Circuits, review is warranted.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

[PUBLISH]

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-11280

D. C. Docket No. 06-61341-CV-DMM

ARNIE GONZALEZ,

Plaintiff-Appellant,

versus

CITY OF DEERFIELD BEACH, FLORIDA,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(November 24, 2008)

Before HULL, MARCUS and KRAVITCH, Circuit Judges.

MARCUS, Circuit Judge:

The plaintiffs, twelve current and former employees of the City of Deerfield Beach, Florida,[1] appeal from the district court's grant of summary judgment in favor of the City in this action for unpaid overtime compensation pursuant to the Fair Labor Standards Act ("the FLSA"), 29 U.S.C. §§ 201 *et seq.* On appeal, the plaintiffs argue that the district court erred by: (1) concluding that they had the "responsibility to engage in fire suppression" within the meaning the FLSA, and thus that they were not entitled to overtime pay under the Act's ordinary overtime requirements; and (2) denying them leave to amend their complaint. After thorough review of the record and careful consideration of the parties' briefs and oral argument, we affirm.

We review a district court's grant of summary judgment *de novo*. *See, e.g., Natural Answers, Inc. v. SmithKline Beecham Corp.*, 529 F.3d 1325, 1329 (11th Cir. 2008). Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). On summary judgment, the court must "view the evidence and all factual inferences therefrom in the light most favorable to the non-moving party, and

---

[1] The suit was brought under the FLSA's collective action provision, 29 U.S.C. § 216(b) (providing that an action for overtime pay "may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated").

resolve all reasonable doubts about the facts in favor of the non-movant." *Kingsland v. City of Miami*, 382 F.3d 1220, 1226 (11th Cir. 2004). Ordinarily, we review a district court's denial of leave to amend a complaint for abuse of discretion. However, where the denial is based on a legal determination that amendment would be futile, we review the district court's decision *de novo*. *Cockrell v. Sparks*, 510 F.3d 1307, 1310 (11th Cir. 2007).

The relevant facts are straightforward. The plaintiffs are twelve current and former employees of the City of Deerfield Beach, Florida. Each works for the City's Fire and Rescue Department as either a Firefighter/Emergency Medical Technician ("EMT") or a Rescue Supervisor. Although each has the training necessary to engage in fire suppression, they rarely, if ever, are called upon to do so. In fact, Gonzalez is the only class member ever to have engaged in fire suppression, and he has done so only on a handful of occasions. Instead, the plaintiffs' duties consist of providing emergency medical assistance. They respond to car accidents, heart attacks, and other situations requiring medical care. As a general rule, the plaintiffs do not respond to fire calls, and when they do, they tend to the victims of the fire instead of fighting the fire itself. Moreover, although the plaintiffs are assigned the protective "turnout" gear worn by firefighters, they do not wear it when responding to fire calls. They wear the gear only when called to accident scenes involving a hazard of broken glass.

In sum, the plaintiffs concede the "theoretical possibility" that a commanding officer could direct them to engage in fire suppression; and they admit that they would be subject to significant disciplinary action if they refused to obey. Nevertheless, they contend that as a

practical matter, they are not responsible for suppressing fires.

The plaintiffs claim that the City has failed to properly compensate them for their overtime work. The Fair Labor Standards Act generally requires employers to pay employees one-and-a-half times their normal rate when they work more than forty hours per week. 29 U.S.C. § 207(a); *Falken v. Glynn County, Ga.*, 197 F.3d 1341, 1345 (11th Cir. 1999). However, the City maintains that it is not subject to these requirements because the plaintiffs fall under an exemption in § 207(k) of the Act for individuals employed by a "public agency engaged in fire protection or law enforcement activities." 29 U.S.C. § 207(k).[2] The dispute in this case turns on whether the plaintiffs can be considered employees "engaged in fire protection activity."

The relevant definition is provided in § 203(y) of the Act, which provides:

> "Employee in fire protection activities" means an employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker, who—
>
> > (1) is trained in fire suppression, has the legal authority and responsibility to engage in fire suppression, and is employed by a fire department of a municipality, county, fire district, or State; and

---

[2] The overtime compensation requirements for employees engaged in fire suppression activities are provided in 29 C.F.R. § 553.230.

> (2) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

29 U.S.C. § 203(y).

To fall within the definition provided in § 203(y), therefore, an employee must: (1) be trained in fire suppression; (2) have the legal authority to engage in fire suppression; (3) have the responsibility to engage in fire suppression; (4) be employed by a fire department of a municipality, county, fire district, or state; and (5) be engaged either (i) in the prevention, control, and extinguishment of fires, or (ii) in the response to emergency situations where life, property, or the environment is at risk. *Huff v. DeKalb County, Ga.*, 516 F.3d 1273, 1279 (11th Cir. 2008). The plaintiffs concede that they meet all of § 203(y)'s criteria except the third. Because their work is effectively limited to providing emergency medical assistance, they maintain that they do not have the "responsibility to engage in fire suppression."

As fate would have it, shortly after the plaintiffs filed their initial brief on appeal, we handed down our decision in *Huff*. That decision leaves the plaintiffs with precious little to argue. *Huff* was a class action brought by employees of the Fire & Rescue Service of Dekalb County, Georgia ("DCFRS"). While some of the employees had (albeit rarely) engaged in fire suppression, others had not. Just like in this case, that dispute turned solely on whether the plaintiffs had the "responsibility to engage in fire suppression" under § 203(y). We concluded that the plaintiffs were responsible, regardless of whether they had ever actually engaged in fire suppression.

Our interpretation was based on § 203(y)'s text. We noted, for example, that by the plain terms of § 203(y)'s final clause, the provision applies not only to an employee who "is engaged in the prevention, control, and extinguishment of fires," but also to one who is engaged in "response to emergency situations where life, property, or the environment is at risk." 29 U.S.C. § 203(y); *Huff*, 516 F.3d at 1281. We further held that the ordinary meaning of the term "responsibility" "does not imply any actual engagement in fire suppression," and that "employees may have a 'responsibility to engage in fire suppression' without ever actually engaging in fire suppression themselves." *Huff*, 516 F.3d at 1281. "This 'responsibility,' " we further explained, "is a forward-looking, affirmative duty or obligation that an employee may have at some point in the future." *Id.* We therefore concluded that the plaintiffs had the responsibility to engage in fire suppression, irrespective of whether their jobs involved the actual exercise of that responsibility. Singling out the relevant features of the plaintiffs' employment, we summarized our conclusion this way:

> It is undisputed that all Plaintiffs have advanced firefighting training. It is also undisputed that the DCFRS has equipped them with "turn-out" gear, sends them regularly to fire scenes, and requires them to be available to assist with fire suppression if they are needed . . . . Further, the DCFRS Fire Captains testified that if the Plaintiffs were ordered to engage in fire suppression, they must do so, or be subject to discipline. While the incident commanders evidently do not, as a matter of policy, order [firemen/paramedics] to engage in fire suppression, this does not mean that the

> [firemen/paramedics] do not have a "responsibility" to engage in fire suppression if ordered. Finally, fire suppression is in each Plaintiff's job description. All Plaintiffs therefore have the "responsibility" to engage in fire suppression within the meaning of § 203(y). While the actual exercise of this responsibility may be contingent on the particular demands of a fire scene, it does not make the responsibility less real.

Id. at 1281-82.

The present case is on all fours with *Huff*. As in *Huff*, the plaintiffs here have been trained in fire suppression, have been issued "turn-out" gear, and can be required on pain of disciplinary action to engage in fire suppression. Given our holding in *Huff*, the fact that they never actually engage in fire suppression is simply irrelevant.

The plaintiffs nevertheless struggle to distinguish their case from *Huff*. They note that, unlike in *Huff*, they are not "regularly" called to fire scenes. But nothing in *Huff* turned on how frequently an employee might be called to a fire scene. Nor do we attach any significance to the plaintiffs' observation that, unlike the plaintiffs in *Huff*, they have not received "advanced" firefighting training. Section 203(y) requires only that an employee be "trained in fire suppression," and as we have noted, the appellants concede that they possess the necessary training.

The plaintiffs further point out that, unlike the employees in *Huff*, the employees here typically do not wear their protective turn-out gear when responding to calls. Since they cannot fight fires without the gear,

they argue they could never *actually* be called upon to fight fires. They also point out that whereas the employees in *Huff* were assigned their duties upon arriving at a scene, the employees here are given their assignments by the dispatcher once a call for emergency medical assistance is received. The argument, apparently, is that in *Huff*, there was always a possibility that after surveying a scene, a supervisor might order a medic or an EMT to help fight a fire if necessary. In contrast, because the plaintiffs here are given their orders prior to arriving at a scene, they are aware beforehand that they will not be fighting fires; as a result, they do not come prepared with the necessary equipment, and thus cannot be called upon to help suppress a fire as readily as the *Huff* plaintiffs.

Again, we do not regard any of these facts as significant. At most, they show merely that under their present operating procedures, it is *unlikely* that the plaintiffs would be called upon to help suppress a fire. But these arrangements might always be changed to make their participation in fire suppression more likely. Ultimately, it remains undisputed that the plaintiffs could be required to help suppress a fire, and that they would be subject to discipline for refusing to do so. As we noted in *Huff*, "responsibility" "is a forward-looking, affirmative duty or obligation that an employee may have at some point in the future." *Id.* at 1281. We therefore hold that the plaintiffs here have the "responsibility to engage in fire suppression" within the meaning of § 203(y).

The plaintiffs also cite two cases from other circuits in support of their interpretation of what it means to have the "responsibility to engage in fire suppression" under § 203(y). Putting aside the dispositive observa-

tion that neither decision is binding here, whereas *Huff* undeniably is, we pause briefly to note that neither decision is contrary to *Huff*.

The plaintiffs rely most heavily on the Ninth Circuit's decision in *Cleveland v. City of Los Angeles*, 420 F.3d 981 (9th Cir. 2005). Like the plaintiffs here, the *Cleveland* plaintiffs had been fully trained in both firefighting and life support, but had never engaged in actual fire suppression. The Ninth Circuit held that the plaintiffs were not covered by § 203(y) because they were not "responsible" for fire suppression under the "ordinary, common-sense meaning" of the word. *Id.* at 990. It is true that there are many similarities between the *Cleveland* plaintiffs' jobs and the jobs of the plaintiffs here; but the most important factor present in *Huff* —and present here—was absent in *Cleveland*: there, unlike here, the plaintiffs could not be ordered to engage in fire suppression; they could *volunteer* to assist firefighters at a fire scene, but they were not required to do so and were not subject to discipline for failing to do so. *Cleveland*, 420 F.3d at 984; *see also Huff*, 516 F.3d at 1279-80.

The plaintiffs also cite *Lawrence v. City of Philadelphia, Pa.*, 527 F.3d 299 (3d Cir. 2008), which the Third Circuit decided shortly after we decided *Huff*. *Lawrence* held that Fire Service Paramedics ("FSPs") employed by the City of Philadelphia were not responsible for engaging in fire suppression, even though "the incident commander theoretically has authority to tell an FSP to do anything at the scene of a fire." *Id.* at 318. The court explained:

> [t]o conclude that an FSP has responsibility for fire suppression activities principally because

> the incident commander theoretically has authority to tell an FSP to do anything at the scene of a fire would require speculation regarding an FSP's responsibility to engage in fire suppression, which is not permitted on summary judgment. Theoretical possibilities are not evidence.

Id. at 317-18.

But, as *Lawrence* itself noted, that case is "fundamentally different" from this one. *Id.* at 315. For one thing, not all of the plaintiffs in *Lawrence* were certified firefighters. As noted above, § 203(y) requires not only that the employee have the "responsibility to engage in fire suppression," but also that he or she possess the requisite training. If the plaintiffs in *Lawrence* lacked the proper training, that fact alone would place them outside § 203(y)'s ambit, regardless of whether they were deemed responsible for fire suppression. Second, despite the assertion that the FSPs might "theoretically" be called to help suppress a fire, there was no evidence indicating that they could be penalized for refusing. *Id.* at 315, 317.

In any event, *Huff* controls here, and under *Huff*, the plaintiffs have the "responsibility to engage in fire suppression" for purposes of § 203(y). We therefore hold that the plaintiffs fall within § 207(k)'s exemption from the FLSA's general overtime requirements.

The plaintiffs argue, nevertheless, that even if they meet § 203(y)'s definition, the § 207(k) exemption still does not apply to them by virtue of the so-called "80/20 Rule" found in Department of Labor Regulation § 553.212. 29 C.F.R. § 553.212(a). Regulation 553.212 provides that "[a] person who spends more than 20 per-

cent of his/her working time in nonexempt activities is not considered to be an employee engaged in fire protection or law enforcement activities" under § 207(k). *Id.* The plaintiffs assert that § 553.212 applies here because they devote more than twenty percent of their work to nonexempt tasks.

But this argument, too, was foreclosed by *Huff*, for there we specifically held that the congressional enactment of § 203(y) in 1999 rendered § 553.212 and the 80/20 Rule in § 553.212 obsolete. *Huff*, 516 F.3d at 1278. We, therefore, hold that the plaintiffs are exempt from the FLSA overtime requirements in § 207(a), and that the district court correctly granted summary judgment to the City.

In light of the foregoing discussion, the plaintiffs' final argument on appeal—that the district court erred in denying them leave to amend their complaint—also clearly fails. The plaintiffs claim that they wanted to amend the complaint after learning during discovery that, unlike the other class members, the named plaintiff, Gonzalez, had engaged in fire suppression in at least a few instances. They sought to create a separate class consisting only of those plaintiffs who had never engaged in fire suppression. As *Huff* indicates, and our discussion above reaffirms, it is irrelevant for purposes of § 203(y) whether an employee has ever engaged in actual fire suppression. Amending the complaint, therefore, would indeed have been futile, and the district court did not err in denying the plaintiffs leave to do so.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

06-61341 CIV-MIDDLEBROOKS/JOHNSON

ARNIE GONZALEZ,
and all others similarly situated,

Plaintiffs,

v.

CITY OF DEERFIELD BEACH, FLORIDA,

Defendant.

_____/

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

This Cause comes before the Court on Defendant's Motion for Summary Judgment (DE 30), filed January 26, 2007. The Court has reviewed the record and is fully advised in the premises.

I. Facts

Plaintiff Arnie Gonzalez ("Gonzalez") filed this action for unpaid overtime compensation pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b), on September 1, 2006. Defendant City of Deerfield Beach ("City") hired Plaintiff as a Firefighter/Emergency Medical Technician (EMT) and employed Plaintiff from April 2, 1999, to October 4, 2005. *See* Gonzalez Dep. at 13, 27.

All firefighters that the City employs are cross-trained either as paramedics or EMT's. There are no employees who are either solely firefighters or paramedics. *See Id.* at 75. As a result of this cross training, anyone in Plaintiff's job can respond to any call where the City has a duty to respond. *See Id.* at 101-102. All uniformed members of the City's Fire Rescue Department are authorized to engage in fire suppression and provide emergency medical services. *See* Stravino Dep. at 152. A firefighter/EMT could participate in any of the following activities: aiming the hose at the fire, rescuing victims, raising ladders, forcing entry, pulling utilities, or helping to rehydrate and rehabilitate exhausted fellow firefighters. *Id.* at 107.

While employed, the Plaintiff worked under the supervision of the Fire Lieutenant. *See* Gonzalez Dep. at 13. Plaintiff possesses both a Florida Standard Firefighting Certification and an EMT Certificate, and he received training in fire suppression techniques. *See Id.* at 22-23 ("I was trained by the Broward Fire Academy. I was also trained by a school in Broward for EMS as an EMT").

The City does not make a distinction between firefighter duties and EMT/paramedic duties. *See* Stravino Dep. at 152. To carry out its duties, Defendant maintains three types of vehicles: fire engines, a platform (large ladder truck), and rescue trucks. *See* Gonzalez Dep. at 30-32. Each one of these trucks is advanced life support (ALS) certified. *See Id.* In riding on any one of these trucks to a fire, Plaintiff would wear standard firefighter gear, known as "turnout gear." *See Id.* at 68-69. Plaintiff would wear different clothing if he were responding to an incident or emergency where there was

no fire. *Id.* at 70. The City's rescue trucks were equipped with a place to keep the firefighter's turnout gear, and they contained fire extinguishers and breathing apparatuses. *Id.* at 83, 131.

It is possible for a firefighter/EMT to be called upon to assist with fire suppression even if the person arrived at the scene on a rescue truck, as opposed to engine or platform. *Id.* at 93, 99. Additionally, even if a firefighter/EMT arrives at the scene of a fire on a fire engine, he or she may perform only EMT work. *Id.* at 94.

Defendant operates as paramilitary style organization with a clear chain of command. *See* Stravino Dep., Vol. 1, at 107. Employees who go outside or do not obey the chain of command are subject to penalties. *See Id.*

While in the Defendant's employ, Plaintiff had the responsibility to engage in fire suppression activity if ordered by his superiors. *See* Gonzalez Dep. at 130-131.[1] Additionally, Plaintiff was specifically ordered to engage in fire suppression activity while working for Defendant. *See Id.* at 133. He was involved in the extinguishing of fires, in removing people from burning structures, and in maintaining the department's fire suppression equipment. *See Id.* at 136. The Chief of Deerfield fire rescue stated that all fire rescue employees have the legal authority and the responsibility to engage in fire suppression when ordered to do so by a

---

[1] Q. If somebody orders you to engage in fire suppression activity you are now responsible to do it? A. Yes.

Q. When your are a commanding person, whatever it was, chief, lieutenant, and the department chief was to order you to engage in fire suppression activities, you then had a responsibility to do that? A. Yes.

commanding officer. *See* Stravino Dep., vol. 2 at 105-106.

II. Legal Analysis

Summary judgment is appropriate only when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party bears the burden of meeting this exacting standard. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). In applying this standard, the evidence, and all reasonable factual inferences drawn therefrom, must be viewed in the light most favorable to the non-moving party. *See Arrington v. Cobb County*, 139 F.3d 865, 871 (11th Cir. 1998); *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997).

The non-moving party, however, bears the burden of coming forward with evidence of each essential element of their claims, such that a reasonable jury could find in their favor. See *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1080 (11th Cir. 1990). The non-moving party "[m]ay not rest upon the mere allegations and denials of [its] pleadings, but [its] response . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). "The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Further, conclusory, uncorroborated allegations by a plaintiff in an affidavit or deposition will not create an issue of fact for trial sufficient to defeat a well supported summary judgment. *See Earley*, 907 F.2d at 1081. The failure of proof concerning an essential ele-

ment of the non-moving party's case necessarily renders all other facts immaterial and requires the court to grant the motion for summary judgment. *See Celotex*, 477 U.S. at 322.

A. The FLSA Exception

Defendant argues that summary judgment is appropriate because Plaintiff falls within the exemption to the 40-hour overtime standard for employees engaged in fire protection activities contained in Section 7(k) of the FLSA. 29 U.S.C. § 207(k). Section 7(k) is a partial exemption for employees engaged in fire protection and law enforcement activities. Employers need not compensate these employees for overtime until they work more than 212 hours over the course of a 28 day period. *See* 29 C.F.R. § 553.32(b). In December 1999, Congress amended the FLSA to add § 203(y) which provides a definition for the term "employee in fire protection activities." The text of the statute is as follows.

> (y) "Employee in fire protection activities" means an employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker, who—
>
> > (1) is trained in fire suppression, has the legal authority and responsibility to engage in fire suppression, and is employed by a fire department of a municipality, county, fire district, or State, and
> >
> > (2) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

29 U.S.C. § 203(y).

The purpose of the amendment was to "clarify the overtime exemption for employees engaged in fire protection activities." Pub. L. No. 106-151, 113 Stat. 1731 (codified as amended at 29 U.S.C. § 203(y)). *See McGavock v. City of Water Valley*, 452 F.3d 423, 426 (5th Cir. 2006). It is clear that the § 203(y) definition supplants and replaces the old definition of "employee in fire protection activities" found in C.F.R. § 553.210. *See McGavock*, 452 F.3d at 427.

It is the Defendant's burden to prove that Plaintiff meets each of the elements of this statute, as it is well-settled that exceptions or exemptions under the FLSA are to be narrowly construed against the employer asserting them. Their application must be plainly and unmistakably within the terms and spirit of the exemption. *See Arnold v. Kanowsky*, 361 U.S. 388, 392 (1960); *see also O'Neal v. Barrow County*, 980 F.2d 674, 677 (11th Cir. 1993).

In this case, the Plaintiff agrees that he meets all the elements of § 203(y) except for the requirement of having the "legal authority and responsibility to engage in fire suppression." *See* Pl. Opp. at 1. As a preliminary matter, I find that there is no material dispute that Plaintiff has the "legal authority" to engage in fire suppression. The Plaintiff was a uniformed member of the Deerfield Beach Fire Rescue, and he was certified as a firefighter by the State of Florida. *See* Gonzalez Dep. at 22-23. It is the fire rescue department's duty to extinguish fires, and it has the legal authority to do so. *See* Stravino Dep., vol. 2 at 105-106. Therefore, it is indisputable that when Plaintiff's superiors order him to fight fires, he has the legal authority to engage in fire suppression.

Plaintiff next argues that he did not have the "responsibility" to engage in fire suppression that § 203(y) requires. The Eleventh Circuit has yet to address exactly what defines "responsibility" in the context of fire suppression. In a similar case, a sister court utilized a definition from the Ninth Circuit in *Cleveland v. City of Los Angeles*, 420 F.3d 981 (9th Cir. 2005). *See Diaz v. City of Plantation*, 2006 U.S. Dist. LEXIS 73424 (S.D. Fla. 2006). There the Ninth Circuit stated that "to have 'responsibility' to engage in fire suppression, [plaintiffs] must have some real obligation or duty to do so. If a fire occurs, it must be their job to deal with it." *Cleveland*, 420 F.3d at 990.

I will utilize this definition, and there can be no material dispute that Plaintiff falls squarely within it. Plaintiff attempts to evade being tagged with the responsibility to engage in fire suppression by arguing that the majority of his duties do not involve responding to fires. He correctly notes that in *Cleveland*, the Ninth Circuit found that the cross-trained firefighter/EMT's were not exempt from the FLSA. Not only is that case not binding on this Court, but the facts that lead to the decision there are clearly distinguishable from those in the case at bar.

Unlike in *Cleveland*[2], all of Defendant's employees

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[2] In finding that the dual function paramedics in *Cleveland* did not have the responsibility to engage in fire suppression the Ninth Circuit considered the following: (1) paramedic ambulances did not carry firefighting equipment or breathing apparatuses; (2) dispatchers did not know if they were sending single or dual function paramedics to a call; (3) paramedic ambulances were not regularly dispatched to fire

(continued...)

are dual certified as either firefighter/EMT's or firefighter/paramedics. *See* Gonzalez Dep. at 75. Therefore, a dispatcher knows that all the responders to a fire scene have the training to fight the fire. Additionally, the Defendant's rescue trucks contain breathing apparatuses for firefighters, and the Plaintiff would wear standard firefighter "turn out gear" when responding to a fire scene. Most importantly, the Plaintiff has participated on more than one occasion in suppressing an active fire. These facts reveal that Plaintiff's reliance on *Cleveland* is misplaced.

The reliance on *Diaz* is also inappropriate, as the majority of the plaintiffs in that case were not trained and certified firefighters. For those that were, there was no evidence that they had ever participated in fire suppression, and there was evidence that department policies actually forbade them from engaging in such activity. *See Diaz*, 2006 U.S. Dist. LEXIS 73424 at *39. For Mr. Gonzalez herein, the opposite is true.

In this case, every member of Defendant's fire rescue department is dual certified and trained to fight fires. All uniformed members of the City's Fire Rescue Department are authorized to engage in fire suppression and provide emergency medical services. Plaintiff himself has been ordered to engage in fire suppression

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[2] (...continued)
scenes and were dispatched only when there appeared to be a need for advanced life support medical services; (4) dual function paramedics were not expected to wear fire protective gear; (5) dual function paramedics were dispatched to a variety of incidents at which they were expected to perform only medical services; and (6) there was no evidence that a dual function paramedic had ever been ordered to perform fire suppression. *Cleveland*, 420 F.3d at 990.

on more than one occasion. The Plaintiff was issued the standard "turn out gear" that all firefighters wear when responding to fires, and he wore this equipment at all times when serving at fire scenes. Plaintiff's own deposition statements reveal that he did have the responsibility to engage in fire suppression when his superiors ordered him to do so, and this was confirmed by deposition statements of the fire rescue chief.

When faced with these incontrovertible facts, there is no material issue or dispute that Plaintiff did in fact have the responsibility to engage in fire suppression as stated in § 203(y). In opposition Plaintiff offers only a declaration with a conclusory allegation that he did not have the authority or responsibility to engage in fire suppression. As noted, conclusory, uncorroborated allegations by a plaintiff in an affidavit or deposition will not create an issue of fact for trial sufficient to defeat a well supported summary judgment. *Earley*, 907 F.2d at 1081. All the facts and evidence make it inescapably clear that Plaintiff did possess the legal authority and responsibility to engage in fire suppression.

B. Application of the 20% Rule

Plaintiff argues that even if he did possess the legal authority and responsibility to engage in fire suppression, he is still not an exempt employee because over 20% of his time was spent in non-exempt work as stated in 29 C.F.R. 553.212.[3] However, I agree with the Fifth

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[3] § 553.212 Twenty percent limitation on nonexempt work.

(a) Employees engaged in fire protection or law enforcement activities as described in §§ 553.210 and 553.211, may also engage in some nonexempt work which is not performed as an incident to or in conjunction with their fire

(continued...)

Circuit's holding in *McGavock* that the passage of § 203(y) has rendered § 553.212's 20% rule obsolete.[4]

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[3] (...continued)
protection or law enforcement activities. For example, firefighters who work for forest conservation agencies may, during slack times, plant trees and perform other conservation activities unrelated to their firefighting duties. The performance of such nonexempt work will not defeat either the section 13(b)(20) or 7(k) exemptions unless it exceeds 20 percent of the total hours worked by that employee during the workweek or applicable work period. A person who spends more than 20 percent of his/her working time in nonexempt activities is not considered to be an employee engaged in fire protection or law enforcement activities for purposes of this part.

[4] The Eleventh Circuit has not addressed this issue after the passage of § 203(y). While I believe that the appellate court would agree with the Fifth Circuit's analysis were it to reach the issue today, the Plaintiff's claim would fail even under the 80/20 rule as previously applied in this Circuit. In *Falken v. Glynn County*, 197 F.3d 1341, 1350-1351 (11th Cir. 1999), the court stated

"an employer of dual-function EMS/firefighters will lose the fire protection activities exemption under the 80/20 rule only if the employees spend more than 20% of their total work hours on activities unrelated to either firefighting or medical services. If waiting fire department employees perform other public services, by engaging in activities analogous to § 553.212(a)'s example of forest conservation, the employer risks losing the exemption. If the employees perform firefighting and EMS functions, and do nothing during their waiting time other than these duties and related or incidental corollary tasks, however, then the employer's burden of proof under the 80/20 rule likely would be easily satisfied."

(continued...)

The 20% rule of § 553.212 was simply an extension of § 553.210, as it provided clarification for the § 553.210 definition of "employee in fire protection activities." It is clear that the 1999 amendment replaced this old definition, and the amendment included no mention of a 20% rule. The Fifth Circuit noted this in *McGavock*, stating

> The only purpose of Congress in amending the statute that is clear to us, is that it intended all emergency medical technicians (EMTs) trained as firefighters and attached to a fire department to be considered employees engaged in fire protection activities even though they may spend one hundred percent of their time responding to medical emergencies. Congress did not otherwise address the 20% rule.

See McGavock, 452 F.3d at 427.

The legislative history of § 203(y) also supports the argument that the 20% rule no longer applies to firefighter/EMT's.[5]

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[4] (...continued)
Here all of Plaintiff's work is either fire suppression or medical service. There is no evidence that he spent any time at all on any work even remotely analogous to forest conservation. Therefore, even if the 80/20 rule applied, it would not save his claim.

[5] Representative Boehner observed:

In recent years, however, some courts have narrowly interpreted the 7(k) exemption and held that emergency medical services personnel do not come within the exemption because the bulk of their time is spent engaged in nonfire

(continued...)

It is simply illogical to argue that when all of a fire rescue department's employees are trained and certified by the state to suppress fires, the FLSA exemption applies only to those employees who spend 80% or more of their time at fire scenes. The § 203(y) amendment makes it clear that Congress did not intend for this unreasonable dichotomy to exist.

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[5] (...continued)
protection activities. These lawsuits have resulted in State and local governments being liable for millions of dollars in back pay, attorneys' fees and court costs. So there is a real need to modernize this area of the Fair Labor Standards Act and to clearly specify who can be considered a fire protection employee for purposes of the exemption. 145 Cong. Rec. H11,499-02, H11500 (daily ed. Nov. 4, 1999) (statement of Rep. Boehner).

Representative Ehlich, the sponsor of § 203(y), further stated:

[F]rom its inception, the Fair Labor Standards Act has exempted fire protection employees from the traditional 40-hour workweek. Historically, any emergency responder paid by a fire department was considered to be a fire protection employee. However, recent court interpretations of Federal labor statutes have rendered this definition unclear. [Section 203(y)] seeks to clarify the definition.

Id. (statement of Rep. Ehlich).

Congressman Clay stated that the bill:

. . . provides that where firefighters are cross-trained and are expected to perform both firefighting and emergency medical services, they will be treated as firefighters for the purpose of overtime. However, where emergency medical technicians are not cross-trained as firefighters, they will remain outside the purview of 7(k) and will be entitled to overtime after 40 hours a week . . .

The new statute, § 203(y), provides a definition previously provided by § 553.210 and its subsidiary regulation § 553.212. These regulations are now obsolete and without effect. The 20% rule no longer applies to the Plaintiff, and it therefore does not remove him from the statutory definition of "employees engaged in fire protection activities." Therefore, Plaintiff falls within the § 207(k) exemption.

Accordingly, it is

ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment (DE 30) is GRANTED.

DONE AND ORDERED in Chambers at West Palm Beach, FL, this 20th day of February 2007.

/s/ Donald M. Middlebrooks
DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

APPENDIX C

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

FEB 05 2009

THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 07-11280-JJ

ARNIE GONZALEZ,

Plaintiff-Appellant,

versus

CITY OF DEERFIELD BEACH, FLORIDA,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before: HULL, MARCUS and KRAVITCH, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

ORD-42
(2/05)

132 (2)

No. 08-1379

Supreme Court, U.S.
FILED
JUL 7 - 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

ARNIE GONZALEZ,
AND ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

CITY OF DEERFIELD BEACH, FLORIDA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Petitioners have presented compelling reasons for the Court to grant the Petition for Writ of Certiorari where the Eleventh Circuit's opinion is consistent with every court of appeals decision involving similar facts and the Eleventh Circuit affirmed the District Court's determination that, based on the factual record before it, all of the Petitioners were exempt within the meaning of the Fair Labor Standards Act, 29 U.S.C. § 203(y) because Petitioners had been trained in fire suppression, could be required to engage in fire suppression or face disciplinary action, and had the responsibility to engage in fire suppression.

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STATEMENT OF THE CASE

Petitioners failed to mention one of the most crucial facts in the record below:

> It is true that there are many similarities between the *Cleveland* plaintiffs' jobs and the jobs of the plaintiffs here; but the most important factor present in *Huff* – and present here – was absent in *Cleveland*: there, unlike here, the plaintiffs could not be ordered to engage in fire suppression; they could *volunteer* to assist firefighters at a fire scene, but they were not required to do so and were not subject to discipline for failing to do so. (Emphasis in original).

Pet. App. 9a.

REASONS FOR DENYING THE PETITION

Petitioners presented no compelling reasons for their Petition for a Writ of Certiorari to be granted. Specifically, Petitioners failed to demonstrate that the Eleventh Circuit's November 24, 2008 Opinion ("Opinion") is in conflict with either a decision of this Court or that of any Court of Appeals. As discussed in detail below, there is no conflict between the Opinion and any other Court of Appeals. Accordingly, there is no reason for review by this Court. The Opinion correctly applied the Fair Labor Standards Act ("FLSA") to the facts of this case.

I. Distinct Facts, Not Legal Interpretation, Are the Reasons for Different Results.

Every court which has addressed this issue has interpreted the word "responsibility" in the exact same manner. *Huff v. DeKalb County*, 516 F.3d 1273, 1279 (11th Cir. 2008); *Gonzalez v. City of Deerfield Beach*, 549 F.3d 1331, 1334 (11th Cir. 2008); *Lawrence v. City of Philadelphia*, 527 F.3d 299, 312-14 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 763 (2008); *Cleveland v. City of Los Angeles*, 420 F.3d 981, 989 (9th Cir. 2005), *cert. denied*, 546 U.S. 1176 (2006). All the courts have noted that the responsibility requirement of the statute means that the plaintiffs must "have some real obligation or duty" to engage in fire suppression. *Huff*, 516 F.3d at 1279; *Gonzalez*, 549 F.3d at 1334; *Lawrence*, 527 F.3d at 314; *Cleveland*, 420 F.3d at 989. The cases reach different results due to the fact that some EMTs/fire fighters could be required to fight fires if ordered to do so, and some could not. *Huff*, 516 F.3d at 1275; *Gonzalez*, 549 F.3d at 1335; *Lawrence*, 527 F.3d at 307; *Cleveland*, 420 F.3d at 984. All the courts that have addressed the issue have applied the common every day meaning of the word "responsibility." *Huff*, 516 F.3d at 1279; *Gonzalez*, 549 F.3d at 1334; *Lawrence*, 527 F.3d at 314; *Cleveland*, 420 F.3d at 989. As the various circuit courts have noted, there have been varying results due to varying facts. *See Huff*, 516 F.3d at 1279; *Gonzalez*, 549 F.3d at 1334-36; *Lawrence*, 527 F.3d at 314-16; *Cleveland*, 420 F.3d at 990. That is to be expected and does not lead to the necessity of review

by this Court. If it did, this Court would be forever bogged down in factual disputes instead of legal conflicts between the circuits. Not one Court of Appeals has determined itself to be in conflict with any other court on this issue.

A. There Is Not a Split in Court of Appeals Decisions.

Respondent concedes that upon first reviewing the cases, it might appear that there is a conflict between *Lawrence* and *Cleveland*, on the one hand, and *Huff* and *Gonzalez*, on the other hand. This is because in *Lawrence* and *Cleveland*, the fire fighters prevailed, but in *Huff* and *Gonzalez*, as well as in *McGavock v. City of Water Valley*, 452 F.3d 423 (5th Cir. 2006), the municipalities prevailed. However, upon studied analysis, and considering the different facts in the respective cases, it becomes clear that there is no conflict in these cases. The fire fighters prevailed in *Lawrence* and *Cleveland* not because those courts had a different view of § 203(y) than did the courts in *Gonzalez* or *Huff*. Rather, the courts in those cases where the fire fighters prevailed were dealing with facts which included EMTs and paramedics which were never called upon or expected to fight fires and would not be disciplined for refusing to fight fires. *Lawrence*, 527 F.3d at 307; *Cleveland*, 420 F.3d at 984. In contrast, the paramedics and EMTs in *Gonzalez* and *Huff* had training in fire suppression, could be called upon to engage in fire suppression, and could be disciplined if they refused

to engage in fire suppression. *Huff*, 516 F.3d at 1275; *Gonzalez*, 549 F.3d at 1335. Due to these divergent facts, the *Gonzalez* and *Huff* cases were decided one way, and *Cleveland* and *Lawrence* another.

The common factors in *Gonzalez* and *Huff* are that (1) the paramedics and EMTs had training in fire suppression, (2) were certified fire fighters that could be called upon to engage in fire suppression, and (3) could be disciplined if they refused to engage in fire suppression. In both *Lawrence* and *Cleveland*, the reputed conflicting cases, not only were the paramedics and EMTs not called upon or expected to fight fires, but they could not be disciplined for doing so. *Lawrence* and *Cleveland* have disparate fact patterns from the case at issue and the other Court of Appeals decisions.

Simply stated, there is no split in the circuits. Rather, the courts have obtained different results due to the different facts presented in the several cases. There is not a single decision where another circuit court actually conflicted with the Opinion of the Eleventh Circuit below. There is no need to grant Certiorari.

B. The Issue of Overtime Compensation Under the FLSA Has Always Been a Fact Specific Inquiry.

Determining who is required to be paid overtime and who may be exempted under any of the many exemptions contained in the FLSA is, and has always

been, a fact specific inquiry. *Overstreet v. North Shore Corp.*, 318 U.S. 125, 132-33 (1945). When the specific facts of each of the cases mentioned by Petitioners as being in conflict are examined, it becomes apparent that each of the cases is factually unique and that there is no conflict. The opinions cited by Petitioners are in harmony when one looks at the underlying facts of the individual cases.

C. The Facts of the *Lawrence* and *Cleveland* Cases Contrast with the *Gonzalez* Case Which Resulted in Different Conclusions.

Petitioners erroneously claim that the Opinion conflicts with the decisions of *Lawrence* and *Cleveland*. Petitioners' various errors begin on page 3 of their Petition, wherein Petitioners state that the action against the City of Deerfield Beach was filed in the District Court for the Southern District of Florida in 1996. In fact, Petitioner Gonzalez filed this action against the Respondent, the City of Deerfield Beach, on September 1, 2006. Pet. App. 12a. Though Petitioners were off by 10 years, this is the most inconsequential error of Petitioners'. What is more important is that Petitioners fail to acknowledge that there are dispositive facts present in this case which were absent in both *Cleveland* and *Lawrence*. A brief review of those decisions is instructive.

In *Cleveland*, the Plaintiffs could not be ordered to engage in fire suppression. *Cleveland*, 420 F.3d at

984. They could *volunteer* to assist fire fighters at a fire scene, but they were not required to do so and were not subject to discipline for failing to do so. *Id.*

Similarly, the facts in *Lawrence* were fundamentally different from the facts in this case. Not all of the Plaintiffs in *Lawrence* were certified fire fighters. As the Court of Appeals in *Lawrence* noted:

> "There is no dispute that the Appellants are not fully cross-trained or dual function fire fighters/paramedics. The FSPs have not received advanced fire fighter training. They are not certified fire fighters." *Id.* at 315.

Furthermore, in *Lawrence*, there was no evidence that any of the plaintiffs could be penalized for refusing to fight a fire. *Id.* at 317. As the Court of Appeals stated in *Lawrence*:

> "There is no evidence in the record to support the assertion that the FSPs are expected to engage in fire suppression as part of their job duties or that they are subject to penalty if they do not do so." *Id.* at 317.

In *Lawrence*, the City was unable to cite a single instance in which an FSP was called upon to enter a burning building to put out a fire or was expected to perform any fire suppression duty other than a few marginal instances involving nothing more than moving a hose line. *Id.* at 306. The *Lawrence* Court noted that the City contended that there was no record evidence of *any* formal reprimand of FSPs for

performing fire suppression duties. *Id.* at 307. (Emphasis added).

Contrasting the *Lawrence* facts with this case, all Plaintiffs are trained and certified as fire fighters. Pet. App. 3a. Moreover, Plaintiffs admitted that they would be subject to significant discipline if they refused to obey an order to engage in fire suppression. Pet. App. 3a. Indeed, it was undisputed in the record below that when a commanding officer ordered any of the Plaintiffs to engage in fire suppression, that the Plaintiffs had the responsibility to do that or face discipline upon failure to follow such an order. Pet. App. 14a. The completely dissimilar facts in the Opinion versus those in *Lawrence* resulted in rulings in each case that are applicable to the unique facts of each case. The interpretation of the FLSA was consistent and there is no conflict between the two cases. None of the courts pronounced an interpretation of § 203(y) that conflicts with a pronouncement of any other.

In *Lawrence*, the City contended that there was no record evidence of any formal reprimand of FSPs for performing fire suppression duties. *Id.* at 307. There was additional evidence in *Lawrence* that if any officer ordered an FSP to assist with fire suppression efforts, the *officer*, not the employee, would have been subject to discipline. *Id.*

There was only limited evidence in *Lawrence* that there had been any incidents of FSPs helping fire fighters at a fire scene. It was all voluntary. This type

of "voluntary assistance" is known as "freelancing." *Id.* The record establishes that the department did not encourage freelancing. *Id.* It is unclear whether the "freelancing" was prohibited by the fire department. "There is some evidence that freelancing was against the standing rules of the department and was not condoned." *Id.* Most importantly, there is no evidence of an FSP being disciplined for not engaging in fire suppression activities at a fire scene. *Id.* at 317.

Lawrence and *Gonzalez* presented the respective courts with vastly different operative facts. On the face of the cases different results seem to have been reached; however, an examination of the cases reveals that the different outcomes are based on different facts and that the cases do not conflict in their interpretation of the FLSA. Similarly, the facts in *Cleveland* are drastically different from those in the Opinion. It is the distinct facts, not a disagreement or conflict of law, that led to the disparate results in the two cases.

D. The Opinion Does Not Conflict with Decisions of Every Other United States Court of Appeals.

Another error made by Petitioners is their contention, made in their Petition for Rehearing En Banc and repeated here, (Petition, p. 5-6) that "this proceeding presents a question of exceptional importance because 'it involves an issue on which the panel

decision conflicts with the authoritative decisions of *every other* United States Court of Appeals that has addressed the issue.'" (Emphasis added). This statement is simply not true. The United States Court of Appeals for the Fifth Circuit issued an opinion which addressed this issue in *McGavock*. *McGavock*, a case ignored by the Petitioners, is not in conflict with the Opinion.

McGavock and the Opinion reach identical results – a decision in favor of the municipalities and against the fire fighters and EMTs. Yet Petitioners claim the Opinion is in conflict with the decision of "every other United States Court of Appeals that has addressed the issue." Petitioners have clearly misstated the situation. The Fifth Circuit in *McGavock* ruled against the employee plaintiffs and in favor of the City, finding that the plaintiffs were employees "engaged in fire protection activities" and thereby exempt from the coverage of the overtime provisions of the FLSA. The *McGavock* court found, just as did the court below, that the plaintiffs had the legal authority to engage in fire suppression and were actually called upon to extinguish, control and prevent fires and to respond to emergency situations where life, property or the environment were at risk, even though fire fighters spent more than 20% of their workweek engaged in dispatching duties, as opposed to actual fire protection activities. Clearly, *McGavock* is another case that has addressed § 203(y), which is not in conflict with the Opinion.

Respondent cannot explain why Petitioners failed to advise the Court of this plainly relevant authority.

The fire fighter cases involving the FLSA are not in conflict. The courts finding, based on the facts, that their respective plaintiffs had the responsibility to engage in fire fighting activity ruled that plaintiffs were exempt pursuant to § 203(y). Those cases wherein the plaintiffs did not have the responsibility to engage in fire fighting activity, such as *Cleveland* and *Lawrence*, were decided the other way. Thus, the FLSA exemption has been applied consistently across the circuits. The Ninth and Third Circuits simply considered plaintiffs that did not fight fires, were not allowed to fight fires, could not be disciplined for not fighting fires, and thus were not exempt from FLSA.

The *McGavock* court did note that the Plaintiffs were all engaged in fire fighting activity, though some of the plaintiffs spent more than 20% of their work-week engaged in dispatching duties as opposed to actual fire protection activities. *McGavock*, 452 F.3d at 424. *Huff*, *Gonzalez* and *McGavock* all differ factually from *Lawrence* because, in *Lawrence*, the court found that the plaintiffs not only were never expected or called upon to perform any fire suppression duties, but that if an officer ordered an FSP to assist with fire suppressant efforts the officer could be disciplined. *Lawrence*, 527 F.3d at 307.

In *Cleveland*, the court found that some of the plaintiffs were single function paramedics that were not even trained in fire protection and that even the

cross trained fire fighter paramedics in that case did not carry firefighting equipment, and were expected to perform only medical services. In *Cleveland*, the court found that the plaintiffs had no real obligation or duty to fight fires. Unlike *Lawrence* and *Cleveland*, the Plaintiffs below could be ordered to engage in fire suppression and could be disciplined for failing to follow such an order. Pet. App. 9a. Accordingly, the lower courts are remarkably consistent with their interpretations and application of the exemption. If an individual has the responsibility to engage in fire suppression, he or she is exempt. If not, he or she is not exempt.

The question presented does not require the attention of this Court. The Petitioners attempt to create a scenario wherein there are conflicts among the circuits by focusing on different results while ignoring the different facts. Petitioners do not address the issue of different fact patterns which have resulted in different rulings. Factual distinctions do not merit this Court's attention.

II. Review Is Not Warranted to Resolve Conflict as There Is No Conflict and the Court Below Correctly Relied on the Facts of the Case and the Rules of Statutory Interpretation.

The decision of the Eleventh Circuit in *Gonzalez* is consistent with the precedent regarding the interpretation of statutes. The Court of Appeals

properly followed the relevant decisions of this Court on statutory interpretation. Interpretation of the meaning of statutes always starts with the words of the law itself. *Kelly v. Robinson*, 479 U.S. 36, 43 (1986). There is no definition of the word "responsibility" in § 203(y). A fundamental principle of statutory construction is that if a word is not defined, the word will be interpreted as having its ordinary, common meaning. *Perrin v. United States*, 444 U.S. 37, 42 (1979).

> [C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others . . . courts must presume that a legislature says in a statute what it means and means in a statute what it says there. . . . When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."

Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) (citations omitted).

Using the ordinary dictionary meaning of the word "responsibility," the Court of Appeals in *Gonzalez* determined that, based on the facts, the District Court properly concluded that the City met its burden of showing that the Plaintiffs had the responsibility to engage in fire suppression. Whereas § 203(y) can be read using the ordinary and common meaning of the words contained in the statute, there is no reason

to go beyond the regular "plain language" definition of the word "responsibility" in the statute.

> We further held that the ordinary meaning of the term "responsibility" "does not imply any actual engagement in fire suppression," and that "employees may have a 'responsibility to engage in fire suppression' without ever actually engaging in fire suppression themselves." . . . This responsibility, we further explained, is a forward looking, affirmative duty or obligation that an employee may have at some point in the future.

Gonzalez, 549 F.3d at 1334 (citing *Huff*, 516 F.3d at 1281).

Since the court below relied on the ordinary meaning of the term "responsibility," the Eleventh Circuit Opinion obeyed the canons of construction laid down by this Court. Both the Eleventh Circuit's interpretation of the facts and the statutory exemption are consistent with this Court's prior guidance. There is no need to grant certiorari. There is not a single case of conflict with regard to § 203(y).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 08-1379

In the Supreme Court of the United States

ARNIE GONZALEZ,
AND ALL OTHERS SIMILARLY SITUATED

Petitioners

v.

CITY OF DEERFIELD BEACH, FLORIDA

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether an emergency medical technician or rescue supervisor who does not actually engage in any fire suppression activities can be said to have the "responsibility to engage in fire suppression" within the meaning of the Fair Labor Standards Act, 29 U.S.C. § 203(y)(1)—a question on which the courts of appeals are in active conflict.

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REPLY BRIEF FOR PETITIONERS

Arnie Gonzalez, and all others similarly situated, respectfully file this reply brief in support of their petition for a writ of certiorari.

ARGUMENT

I. The Circuit Split.

Even before the Eleventh Circuit issued the decision under review, Judge Hardiman of the Third Circuit thought that he recognized "an emergent circuit split regarding the interpretation of the phrase 'responsibility to engage in fire suppression' as used in § 203(y) of the Fair Labor Standards Act (FLSA)." *Lawrence v. City of Philadelphia, Pennsylvania*, 527 F.3d 299, 320 (3d Cir.) (Hardiman, J., dissenting), *cert. denied*, 129 S. Ct. 763 (2008). The essential division between petitioners and respondent City of Deerfield Beach, Florida ("City") is whether or not Judge Hardiman was correct. *Compare* Pet. 11 ("The decision of the panel—followed by the en banc court's refusal to take up the issue—confirms [the circuit] split and leaves the Eleventh Circuit in direct conflict with both the Ninth Circuit and the Third Circuit."), *with* Brief in Opposition ("BIO") 1 ("[T]here is no conflict between the [Eleventh Circuit] Opinion and any other Court of Appeals.").

The City readily concedes that on first glance, "it might appear that there is a conflict between *Lawrence* and [the Ninth Circuit's decision in] *Cleveland*, on the one hand, and [the Eleventh Circuit's decisions in] *Huff* and [the instant case], on the other hand." BIO 3. But the City's basic, and oft-repeated, point is that "distinct facts, not legal interpretation, are the reasons for [the] different results." BIO 2 (section heading). Therefore,

the City asserts that the facts in the various cases are not just "different" (BIO 3, 4, 8, 11) but "fundamentally different," "vastly different," and "drastically different" (BIO 6, 8). Indeed, *different* is far too humble a word to describe the yawning factual chasm stretching before the City's eyes: the respective facts are also "varying," "divergent," and "disparate" (BIO 2, 4), not to mention "completely dissimilar" and even "unique" (BIO 5, 7).

The foregoing demonstrates that the City's counsel has a serviceable thesaurus, but the reality regarding the facts of the relevant cases is more prosaic. Like any set of cases, *Lawrence* and *Cleveland* and the decision below are not identical in every last factual particular. But as explained in the petition (at 6-11) and as reiterated here, the outcomes in favor of the employees in the Third and Ninth Circuits (in contrast to the outcome in favor of the municipal employer below) can realistically be explained only by those courts' differing approaches to interpreting and applying the term "responsibility to engage in fire suppression" in 29 U.S.C. § 203(y)(1).

A. *Cleveland v. City of Los Angeles.*

The City would distinguish the Ninth Circuit's decision in *Cleveland v. City of Los Angeles*, 420 F.3d 981 (9th Cir. 2005), *cert. denied*, 546 U.S. 1176 (2006), on the following ground: In *Cleveland*, "the Plaintiffs could not be ordered to engage in fire suppression. They could *volunteer* to assist fire fighters at a fire scene, but they were not required to do so and were not subject to discipline for failing to do so." BIO 5-6 (citing 420 F.3d at 984). This is not a new point; instead, the City simply plagiarized the opinion below: In *Cleveland*, "the plaintiffs could not be ordered to engage in fire suppression; they could *volunteer* to assist firefighters at a fire scene,

but they were not required to do so and were not subject to discipline for failing to do so." Pet. App. 9a (likewise citing 420 F.3d at 984).

Not surprisingly, the petition has already confronted this point at length. *See* Pet. 7-9 & n.2. In brief, the Ninth Circuit did not say that the *Cleveland* plaintiffs "could not be" ordered to engage in fire suppression; it said that there "is no evidence that any Plaintiff . . . *has ever been* ordered to perform fire suppression." 420 F.3d at 984 (emphasis added); *accord id.* at 990 ("there is no evidence that a dual function paramedic *has ever been* ordered to perform fire suppression" (emphasis added)). This evidentiary-based approach—examining (among other factors) whether an employee has actually been ordered to perform fire suppression—stands in marked contrast to the Eleventh Circuit's approach. Under the test developed in *Huff v. DeKalb County, Georgia*, 516 F.3d 1273 (11th Cir. 2008), and applied by the panel below, this kind of evidence categorically does not matter: "Given our holding in *Huff*, the fact that [petitioners] never actually engage in fire suppression is simply irrelevant." Pet. App. 7a; *accord* Pet. App. 11a ("As *Huff* indicates, and our discussion above reaffirms, it is irrelevant for purposes of § 203(y) whether an employee has ever engaged in actual fire suppression.").

In the Ninth Circuit's understanding of § 203(y)(1), for employees "to have the 'responsibility' to engage in fire suppression, they must have some real [i.e., actual] obligation or duty to do so"; that is, "[i]f a fire occurs, it must be their job to deal with it." *Cleveland*, 420 F.3d at 990; *see also id.* (reviewing "evidence" as to plaintiff-employees' actual jobs vis-à-vis fire suppression). Petitioners would easily prevail under this standard, given the panel's acknowledgment that although petitioners

have the requisite training to engage in fire suppression, "they rarely, if ever, are called upon to do so." Pet. App. 3a; *cf. Weaver v. City & County of San Francisco*, No. C 03-1589 SI, 2006 U.S. Dist. LEXIS 62650, at *3 (N.D. Cal. Aug. 18, 2006) (applying *Cleveland* to grant summary judgment to the *plaintiffs*, notwithstanding that "an Incident Commander at the scene of a fire can and on occasion does order [the plaintiffs] to engage in fire suppression activities").

By contrast, in the Eleventh Circuit's understanding of § 203(y)(1), whether the employees' job is to deal with fires, i.e., the extent to the employees "actually engage" in fire suppression, is "irrelevant." Pet. App. 7a. Thus, the panel below ruled that petitioners would not have prevailed even if they "had *never* engaged in fire suppression." Pet. App. 11a (emphasis added). In any reasonable universe, this ruling bespeaks a conflict between the Ninth and Eleventh Circuits.

B. *Lawrence v. City of Philadelphia.*

The City would distinguish the Third Circuit's decision in *Lawrence* on two factual grounds. First, and again plagiarizing the panel's opinion, the City observes that "[n]ot all of the Plaintiffs in *Lawrence* were certified fire fighters." BIO 6; *cf.* Pet. App. 10a (observing that "not all of the plaintiffs in *Lawrence* were certified firefighters"). As the petition explained, however, the question whether the *Lawrence* plaintiffs satisfied the separate requirement that they be "trained in fire suppression," 29 U.S.C. § 203(y)(1), ultimately did not get resolved by the Third Circuit. *See* 527 F.3d at 319 (The plaintiffs "were not responsible for fire protection activities as a matter of law," and so it "is not necessary to reach the question whether [they] were 'trained' in fire

suppression."), *quoted in* Pet. 10 n.3. Accordingly, any differences in certification or other training between petitioners and the *Lawrence* plaintiffs is irrelevant; the respective decisions of the Third and Eleventh Circuits simply did not turn on that factual point.

Second, the City asserts that in *Lawrence*, "there was no evidence that any of the plaintiffs could be penalized for refusing to fight a fire." BIO 6; *cf.* Pet. App. 10a (stating that in *Lawrence*, "there was no evidence indicating that [the plaintiffs] could be penalized for refusing" to fight a fire). But the *possibility* vel non of an employee's being ordered to fight a fire, and thereafter being penalized for refusing to do so, did not matter to the Third Circuit. For that court in the present context, "[t]heoretical possibilities are not evidence." 527 F.3d at 318. Thus, *Lawrence* (like *Cleveland*) turned on the evidence of what the plaintiff-employees *actually* did in their jobs:

> [W]e cannot sustain the District Court's holding that the City has shown that [the plaintiffs] have the legal responsibility to engage in fire suppression. *There is substantial evidence to the contrary*. [The plaintiffs] are not hired to fight fires, not even in small part; indeed, they are not expected to fight fires as part of their job duties.

Id. at 317 (emphasis added).

Contrast this non-theoretical, evidence-based interpretive approach with the Eleventh Circuit's approach in *Huff* and in the decision below. As the petition has already observed, the panel below positively embraced "the 'theoretical possibility' that a commanding officer could direct [petitioners] to engage in fire suppression,"

and so the fact that petitioners "can [i.e., theoretically] be required" to engage in fire suppression was dispositive for the panel. Pet App. 3a, 7a, *quoted in* Pet. 11; *accord* Pet. App. 7a, 11a (finding it "irrelevant" whether petitioners actually fought fires, even in small part).

In light of the above-described rulings, it is inconceivable to assert that "the lower courts are remarkably consistent with their interpretations and application of the exemption" in 29 U.S.C. § 203(y)(1). BIO 11. To the contrary, the lower courts are manifestly in conflict with one another in interpreting and applying that statute.

C. *McGavock v. City of Water Valley*.

The City charges that petitioners made "[a]nother error" by contending in their petition for rehearing en banc that "this proceeding presents a question of exceptional importance because 'it involves an issue on which the panel decision conflicts with the authoritative decisions of *every other* United States Court of Appeals that has addressed the issue.'" BIO 8-9 (emphasis by City) (quoting Pet. 5-6). According to the City, that contention "is simply not true" given the Fifth Circuit's decision in *McGavock v. City of Water Valley, Mississippi*, 452 F.3d 423 (5th Cir. 2006), a decision that petitioners "ignored," such that petitioners "have clearly misstated the situation." BIO 9.

These charges are scurrilous. It is apparent that *McGavock* simply did not address the issue presented by the decision below, by *Cleveland*, and by *Lawrence*—the proper interpretation of the phrase "responsibility to engage in fire suppression" in § 203(y)(1). In contrast to all those cases, the plaintiff-employees in *McGavock* were "five municipal firefighters" who had "graduated from the fire academy, where they were trained in fire

suppression"; they had "the legal authority to engage in fire suppression and [were] actually called upon to extinguish, control, and prevent fires." 452 F.3d at 424. Given these facts, it is not surprising that these employees "concede[d] that they meet the § 203(y) definition," including the fact that they had "responsibility" to engage in fire suppression. *Id.* at 427.

The employees argued that even though they met the statutory definition, they nonetheless should not be treated as firefighters for purposes of FLSA's overtime provisions in light of a Department of Labor regulation codified at 29 C.F.R. § 553.212(a):

> They argue that the regulation continues to limit employees considered engaged "in fire protection activities" to employees who spend 80% or more of their time engaged in fire protection activities. Because the plaintiffs spend more than 20% of their time working as dispatchers, they contend they are not "employees in firefighting activities" [for purposes of 29 U.S.C. § 207(k)].

McGavock, 452 F.3d at 427. The Fifth Circuit rejected this argument, ruling that the cited regulation was "obsolete and without effect" and therefore did not "remove [the plaintiffs] from the statutory definition of 'employees engaged in fire protection activities.'" *Id.* at 428.

Therefore, *McGavock* does not bear in the slightest on the question presented. Indeed, although petitioners did advance in the lower courts an argument similar to that advanced by the plaintiffs in *McGavock*, petitioners have expressly stated that they "do not seek review" as to that issue. Pet. 5 n.1. In short, *McGavock* in no way detracts from the circuit split on the question presented.

II. Why Review Is Warranted.

Part II of the petition argued that "review is warranted to resolve the [above-described] conflict" among the three courts of appeals. Pet. 11 (section heading). Specifically, "the question presented here is a recurring one, and the panel's decision contradicts a long-standing and important principle of federal labor law." *Id.* Even as it denies any conflict, the City does not dispute that this case presents a recurring question of federal labor law. *See* BIO 11-13.

More importantly, the City does not even address, let alone deny, the point that the "panel's interpretation of the FLSA contravenes the principle, long recognized and applied by this Court . . . , that 'exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit.'" Pet. 12 (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)). That salutary principle highlights the importance of the question presented. In short, the City has adduced no reason why review is not warranted if the Court agrees with petitioners that the lower courts are in conflict.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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